

GOVERNOR'S CONSUMER ENERGY PROTECTION TASK FORCE

Minutes of the Meeting

May 24, 2004

Room 102, State Capitol Building

Helena, Montana

ROLL CALL: The May 24, 2004, meeting of the Governor's Consumer Energy Protection Task Force was called to order by Chairman John Hines at 1:05 p.m., in Room 102, State Capitol Building, Helena, Montana. Members present were John Hines, Chairman, Commissioner Rob Rowe, Representative Alan Olson, Haley Beaudry, Chuck Swysgood, Tom Power, Bill Drummond, and Dave Wheelihan. Mr. John Bushnell staffed the meeting.

Welcome and Introduction

Chairman Hines announced he expected this to be the last meeting of the Governor's Consumer Energy Protection Task Force (Task Force) unless another issue arises before the time period expires under the Executive Order.

Task Force Recommendations on Ring-Fencing

- **John Bushnell, NWPCC**

Mr. Bushnell presented the new proposal from the ring-fencing subcommittee (Exhibit 1). Mr. Bushnell highlighted the substantial changes since the last meeting of the Task Force as the section entitled "Ring-Fencing Principles." Mr. Bushnell reviewed the four principles the subcommittee would like to see followed in the development of legislation. Mr. Bushnell noted the definition of "affiliate interest" was changed by removing "person."

Mr. Bushnell reviewed the subcommittee's recommendation regarding the Public Service Commission's (PSC) authority to review dividend payments. The basis for the review would include materiality and whether the payments would jeopardize the utility. The PSC would have the authority to review, but in order to limit, it would be subject to a materiality clause.

Mr. Bushnell noted the recommendations contain a strong forbearance provision which would allow utilities with a small customer base to request and receive forbearance from any of the recommendations.

- **Task Force Discussion**

Tom Power's impression from the subcommittee work was they would suggest leaving open the possibility that the PSC could grant forbearance at any time, besides the explicit forbearance to small utilities. Dr. Power thought the recommendation could now be read the PSC could not grant forbearance to a larger utility.

Chairman Hines recalled discussion in the subcommittee was to include generic forbearance language permitting or authorizing, but having specific forbearance for small utilities. Chairman Hines agreed the authority needed to be enlarged. Mr. Bushnell agreed with these comments and stated he would add the language.

Representative Alan Olson commented that since the PSC has developed ring-fencing language that applies strictly to NorthWestern Energy (NWE), the Task Force may have been simply spinning its wheels. Rep. Olson wondered what affect the PSC's language would have on the work of the Task Force.

Commissioner Rowe responded the Task Force's work on ring-fencing was time well spent and that the agreement with NWE could not have been achieved without the hard work of the Governor, legislative leadership, and the Task Force. Commissioner Rowe noted there are differences in language that are complementary, and the Task Force's report is of general applicability. Commissioner Rowe acknowledged two avenues, which included a broad set of policies that apply to all and a set of requirements that are utility-specific. Commissioner Rowe stated the recommendations of the Task Force report will apply to all utilities. Commissioner Rowe noted the recommendations are, to some extent, more consistent with a holding company model. The NWE requirements are designed to work with NWE's preferred structure of having the utility as the parent. Commissioner Rowe suggested the second principle could be expanded and state explicitly that the enumeration of specific authority in the statute is not to be interpreted to the exclusion of other PSC authority. Further, Commissioner Rowe suggested the principle could say it does not modify the terms of any prior agreement voluntarily entered into by a regulated utility and approved by a court or by the PSC.

Chairman Hines stated the issue as whether to have a single state policy or an individual utility policy.

- **Public Comment**

John Alke, representing Montana Dakota Utility (MDU), submitted a revised version of Mr. Bushnell's Ring-Fencing paper on behalf of MDU (Exhibit 2). Mr. Alke indicated MDU did not disagree with any of the proposed ring-fencing recommendations and agreed with the change to the forbearance provision.

Mr. Alke expressed concerns with the general ring-fencing principles. Mr. Alke suggested changing ring-fencing principles 3 and 4, as well as eliminating the definition of "affiliate interest," and providing a definition for "affiliate transaction." Mr. Alke observed the PSC has always had the authority to review transactions to ensure the ratepayer does not pay an exorbitant amount. Mr. Alke admitted the language in the fourth principle makes him nervous because the PSC has

never regulated transactions and suggested "review" would be more appropriate. Upon question from Chairman Hines, Mr. Alke explained review would allow the PSC the authority to not allow full-cost recovery. Mr. Alke also suggested a broad definition of "affiliate transaction" would be more appropriate than "affiliate interest." Mr. Alke asked the Task Force to notice that in certain respects the recommendations go beyond the four principles, and cited the dividend payment as an example. Mr. Alke closed by stating MDU has no problem with the Task Force's recommendations with the changes he is proposing.

Chairman Hines asked Mr. Alke if he would support a definition for Affiliate Transaction that read "'Affiliate Transaction'" is any transaction between the regulated energy utility" Mr. Alke did have a problem with that proposed changes since in MDU's case, the regulated energy utility and MDU Resources, the corporate parent, are the same company. Mr. Alke used the words "regulated by the Public Service Commission" to provide a tie with the historical function of the PSC.

Commissioner Rowe commented the intent in both cases is consistent, and did not see a problem with the language Mr. Alke was proposing.

Dr. Power was uncertain about the implications of changes to the fourth principle, but commented if the recommendations would remain the same, there would not be a problem. Dr. Power thought there may be transactions where the PSC would want to regulate or place restrictions on the transaction. Dr. Power suggested there would be transactions that could threaten a utility's credit quality or place utility property in jeopardy, and noted the PSC would want to have authority over those transactions. Mr. Alke suggested the appropriate way to do that would be to catalogue transactions and cover those transactions with a very specific proposal. Dr. Power commented utilities in Montana are not organized as holding company organizations, but the subcommittee did have a holding company structure in mind, and this has resulted in some inconsistency. Dr. Power thought these two different ways of thinking may not blend well since they are talking about having ring-fencing regulations on a form of organization that currently does not exist.

- **Carl Schweitzer**

Carl Schweitzer, representing a group of contractors concerned about ring-fencing, spoke about when MDU requested a rate increase for gas and questioned whether certain services provided by MDU were being subsidized. The PSC lowered MDU's proposed rate increase by the amount of profit that was assigned to the particular activity. Mr. Schweitzer would like to see a ring put around the particular activity since it is not really part of the utility activity. Mr. Schweitzer wanted to know if the ring-fencing legislation would address the question. Mr. Bushnell stated it would not address the problems presented by Mr. Schweitzer since the Task

Force and the subcommittee are of the opinion that if a transaction does not jeopardized a utility's credit rating, it does not meet the materiality requirements of the recommendations. Mr. Bushnell added the normal rate case proceeding process would still be available to Mr. Schweitzer and the group he represents.

Agreement in Principle Between NOR, MPSC, and MCC

- **Bob Rowe, Montana Public Service Commission**

Bob Rowe, Commissioner, Montana Public Service Commission, commended the Task Force and all the parties for their hard work and support during this effort, and provided the Task Force with an overview of the Agreement in Principle Between NOR, MPSC, and MCC (AIP) (Exhibit 3). Commissioner Rowe provided the Task Force with an update on NWE's bankruptcy and stated the Disclosure Statement is being finalized, and the issues raised by the PSC and the Montana Consumer Counsel (MCC) have been addressed. A stipulation between MCC and NWE resolving the outstanding financial issues will be filed with the PSC. Application for recovery of fees and expenses associated with the intervention was supported by the Creditor's Committee, and that application will include the intervention by the Montana Department of Natural Resources (DNRC).

Commissioner Rowe identified an audit of the transmission and distribution system as crucial and explained that audit is being conducted by Liberty Consulting, and their report should be filed by July. Commissioner Rowe added rates should be based on costs and investments, expenditures, and procedures and should be adequate to provide good service. Upon question from Bill Drummond, Commissioner Rowe explained the PSC should be able to test the veracity of the reports received from NWE about the health of its system once it receives the report from Liberty Consulting. Chairman Hines asked whether the PSC had received status reports, and Commissioner Rowe replied those status reports have preliminarily indicated the system is at a standard level.

In terms of ring-fencing and the draft recommendations from the Task Force, Commissioner Rowe noted the ring-fencing portion of the AIP contains a great deal of information. The AIP provides for advance notice for various types of transfers, specific language concerning financing, segregation of utility company finances from other risks at the parent level, restrictions on being able to encumber public utility assets, and making sure debt associated with assets follows those assets. Commissioner Rowe spoke about the limited investment basket and the flexibility, on a limited basis, to provide funding for non-utility purposes. If 40 percent of the company or greater is equity, then the investment basket provisions are available, beginning with up to \$60 million. Commissioner Rowe noted that of that \$60 million, \$50 million is associated with either Colstrip operations or to purchase gas for utility operations in other states. The

overall amount of the investment basket can notch up if the utility ratings remain good; conversely, the amount can be reduced should the utility's ratings decrease.

(Tape 1; Side B)

Commissioner Rowe expressed concern that the new board be totally independent and would like to see people on the board with utility expertise. The identity of board members will be released 15 days prior to the hearing to confirm the plan, and the Creditors' Committee would like to defer as many decisions as possible to the new board. In addition, one member of the Executive Management Committee and one member of the Energy Supply Board will reside in Montana. Commissioner Rowe explained that in exchange for a number of provisions, the PSC and MCC have agreed not to object to the Plan of Reorganization. Commissioner Rowe emphasized the difference between not objecting to the plan and supporting the plan, and noted the PSC is free to evaluate and comment on any third-party offers to acquire NWE. Commissioner Rowe thought a third-party offer would be more likely post-bankruptcy.

Haley Beaudry thought the exclusivity period was extended, and Commissioner Rowe responded the exclusivity period was extended until the end of July, and that during the period of exclusivity, an alternative plan cannot be filed.

Dave Wheelihan asked if the AIP is accepted by the bankruptcy court whether the Legislature would have any ability to modify or change any of the conditions or terms. Commissioner Rowe explained if the AIP is accepted by the bankruptcy court, a companion agreement would be filed by NWE for approval by the PSC and MCC. The Legislature could make revisions, but Commissioner Rowe stated he would not like to see that happen.

Rep. Olson commented one of his concerns is that public policy needs to be broad, and individual companies should not be singled out for regulatory review on a as-needed basis. Rep. Olson felt this is bad policy and could lend a hand to other businesses not wanting to do business in Montana.

Chairman Hines followed up on Mr. Wheelihan's question, and asked Commissioner Rowe if the bankruptcy court is only affirming the ability of NWE to enter into the stipulation. Commissioner Rowe explained the bankruptcy court is approving Disclosure Statement language, the Plan of Reorganization, and then reviewing the stipulation. Chairman Hines understood that one of the reasons the Task Force agreed to research ring-fencing was that it was unclear whether the PSC had sufficient authority, and the Task Force wanted to provide clarification of that authority. Chairman Hines noted the PSC has now entered into a stipulation where the PSC's authority remains questionable. Commissioner Rowe responded parties routinely assert legal rights in a case and then resolve disputes through stipulations. Commissioner Rowe stated the

Task Force has made it clear it does not want to diminish the authority of the PSC, but seeks to identify specific practices. Chairman Hines summarized the parties who entered into the stipulation are not going to question the PSC's authority, but wondered if another party would. Commissioner Rowe explained someone could attack the stipulation in court, but did not feel that was very likely, or the legislature could attempt to modify the terms of the stipulation. Chairman Hines noted the Task Force has identified ring-fencing as a good idea, and the Task Force should move forward.

Mr. Drummond asked about the limited investment basket and where the numbers came from. Mr. Drummond also asked for a scale in order to determine the significance of the numbers. Commissioner Rowe replied \$10 million would be non-utility related. Commissioner Rowe believed a utility should be allowed some flexibility to invest in non-utility investments, but that flexibility should be tied to the utility's rating.

Al Brogan, attorney for the Montana Public Service Commission, pointed out that NWE values the company at \$1.5 billion; therefore, the \$60 - \$90 million is a relatively small amount.

- **Comparison to Agreement, John Bushnell**

Mr. Bushnell reviewed a comparison of the Task Force recommendations and the AIP (Exhibit 4). Mr. Bushnell also provided Commissioner Rowe's comparison of Task Force recommendations and the AIP (Exhibit 5). Mr. Bushnell stated he was uncertain if the AIP limits the regulated energy utility from guaranteeing the debt of a subsidiary. Dr. Power noted it speaks to credit support of subsidiaries, and Commissioner Rowe agreed. Commissioner Rowe added one issue not addressed is transaction review because it is outside the scope of the agreement.

Chuck Swysgood identified his major concerns and areas requiring clarification. Mr. Swysgood stated that while there has been major areas of cooperation during the bankruptcy, it has been fully understood by all the parties that there could be some differences of opinion as they came closer to developing a plan. Mr. Swysgood referred to Rep. Olson's concern about the Task Force spinning its wheels and stated he sees two distinct opposites. The Task Force could recommend going forward with legislation that addresses ring-fencing and could provide criteria for the legislation. On the other hand, the AIP has an entirely different set of criteria that addresses certain things that are only applicable to NWE. Mr. Swysgood expressed concern about the potential for controversy between potential legislation and the AIP. Mr. Swysgood was clear there could not be two sets of standards in the process.

Chairman Hines found it curious that NWE would agree to a stipulation which singles them out as distinct from other energy suppliers given that NWE's arguments in various forums have been that they have been treated separately. Chairman Hines recalled there were very

specific discussions within the Task Force and the subcommittee about certain aspects of ring-fencing, and the consensus was those aspects should not be carried forward into a policy on ring-fencing; however, Chairman Hines stated he is discomforted seeing those aspects now embedded in the AIP. In addressing discovery, Chairman Hines thought it was clear, at least from a Task Force perspective, that they were not going to get involved with non-affiliate subsidiaries, and if there was not an affiliate transaction with the energy utility, the PSC should not have authority to get involved. In addition, Chairman Hines was concerned because there is an ability for the PSC to continue to modify ring-fencing on an ongoing basis, and this ability could be used to either strengthen or weaken the ring-fencing. Chairman Hines noted this does not create a stable policy platform.

Dr. Power stated his understanding was proposed legislation would clarify the PSC's authority to gather information on affiliate transactions that were a threat to the regulated utility. Dr. Power did not feel the legislation should specify how the PSC accomplishes ring-fencing, but simply clarify the PSC's authority to do so. Dr. Power assumed the where and how would depend upon particular circumstances and how those circumstances are evaluated by the PSC. Dr. Power suggested one route is a general framework which clarifies the PSC's authority to protect the regulated authority, and that how the PSC exercises that authority is a separate issue.

Chairman Hines agreed the Task Force clarified the PSC does have the authority to do ring-fencing, but thought the Task Force did provide specificity in certain areas. Chairman Hines stated the PSC and MCC, in some instances, took a different direction than what the Task Force had decided. Dr. Powers recalled the intent was to clarify the PSC's authority and not to limit the authority.

Mr. Swysgood commented the Legislature will set parameters on which rules can be developed to implement the legislation. Mr. Swysgood's understood the intent of the Task Force was to clarify whether the PSC had authority to require ring-fencing, but he felt the PSC clearly felt it had that authority since it had already entered into the AIP. Mr. Swysgood noted the AIP could be implemented before the Legislature has a chance to meet and pass legislation. Mr. Swysgood's impression was that ring-fencing authority existed in language today, and the Task Force would do whatever was necessary to either clarify the authority or agree that the PSC should not have the authority.

Rep. Olson commented clarification could be interpreted as limiting, and he did not feel it was ever the intention to give the PSC broad authority to do whatever it pleases. Rep. Olson would like to see clarification regardless of whether it would limit existing agreements. Rep. Olson believed the PSC may not have had the necessary ring-fencing authority to enter into the AIP. Rep. Olson would like to see the issue come before the ETIC.

(Tape 2; Side A)

Dr. Power thought a test of the PSC's ring-fencing authority would be if the PSC was ordering NWE to behave in a particular manner. Dr. Power stated the PSC had entered into a voluntary agreement, and commented stipulations are regularly entered into between the PSC and various parties. Dr. Power stated he was somewhat bothered by the exercise of legal authority by the PSC over another party.

Chairman Hines commented there is a delicate balance between legislative action regarding ring-fencing and the PSC's general authority. Commissioner Rowe strongly suggested Bob Nelson, Montana Consumer Counsel, be allowed to address the Task Force. Commissioner Rowe stated he has enjoyed being able to work on energy issues without politics being involved. Commissioner Rowe identified the role of the Legislature as critical in setting policy and providing oversight. Commissioner Rowe noted utility businesses vary greatly, and those businesses must operate under different laws. In entering into the AIP, Commissioner Rowe was interested in seeing a viable company emerging, and Commissioner Rowe suggested the AIP would accomplish that goal and would provide stability for NWE. Commissioner Rowe admitted the AIP could be modified by the Legislature, but sincerely hoped the Legislature would not make any changes. Commissioner Rowe did not see a realistic way the PSC could modify the agreement to make it stronger without first obtaining agreement from NWE. Commissioner Rowe commented he sees more consistencies than differences in the agreement.

Rep. Olson has always enjoyed working with Commissioner Rowe and wondered if the people that follow the PSC will accept the fact they cannot unilaterally modify the agreement. Commissioner Rowe commented if they accept the fact out of the gate, they will be reminded of the fact very quickly. Rep. Olson's concern was the AIP would be modified on a case-by-case basis and not on a broad state-wide policy. Commissioner Rowe felt it would be difficult, if not impossible, to modify the AIP without the consent of NWE. Commissioner Rowe stated that during the financial investigation, there were differing views of the PSC's authority, and MCC's consistent position has been that the PSC already has the authority under its general powers. NWE's position has been the PSC does not have the authority, and it is a matter of state and federal law. Commissioner Rowe spoke about Westar's bankruptcy and the positive results from that proceeding and felt the same positive results could be achieved by NWE.

Chairman Hines noted the language in the AIP on page one, under structure, gives the PSC clear authority to change ring-fencing provisions. Commissioner Rowe explained the language was included at the request of NWE that they be allowed to seek modification. Commissioner Rowe agreed any party could request modification, but could not envision it happening.

Mr. Swysgood stated his remarks pertained only to potential conflict he foresees and did not pertain solely to any one entity. Mr. Swysgood identified the Task Force's choices as suggesting the Governor make a recommendation to the ETIC or negotiate agreements with individual utility companies that go bankrupt, which would not address the concerns of consumers.

Rep. Olson moved the Task Force accept the subcommittee's recommendation with the addition of Mr. Alke's amendments. The motion was seconded by Mr. Drummond.

Commissioner Rowe supported the motion, including the amendments presented by Mr. Alke, and moved an additional amendment stating this would not modify the terms of any prior agreement voluntarily entered into by a regulated entity and approved by a court. Dr. Power seconded Commissioner Rowe's motion.

Rep. Olson stated he would oppose Commissioner Rowe's amendment.

Mr. Swysgood suggested segregating the amendments for voting purposes before voting on Rep. Olson's motion.

Mr. Beaudry noted language needed to be added stating forbearance would be generally available to any utility that would request it, but would be specifically granted to those with less than 100 customers. Mr. Bushnell agreed and stated he would include that language in No. 5 under Ring-Fencing Recommendations.

Commissioner Rowe's motion to exclude the terms of any prior agreement voluntarily entered into by a regulated entity and approved by a court failed.

The motion of Rep. Olson that the Task Force pass the report, including amendments of Mr. Alke and new language on forbearance, to the Governor for recommendation to ETIC carried unanimously.

Chairman Hines suggested the Task Force note the issue raised by Commissioner Rowe, but not give a Task Force position on the issue. The Task Force agreed.

Wrap-up of Governor's Consumer Energy Protection Task Force

Mr. Swysgood thanked the Task Force for its excellent work in a difficult situation. Chairman Hines agreed and thanked Task Force members for their hard work and effort.

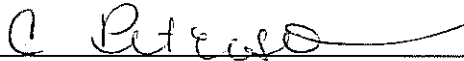
There being no further business to come before the Task Force, the meeting adjourned at 3:00 p.m.

APPROVED AS TO FORM AND CONTENT:

By: _____
John Hines, Chairman

TRANSCRIPTION CERTIFICATION

I, Cynthia A. Peterson, residing in Helena, Montana, do hereby certify that the foregoing pages constitute a true and accurate transcription, to the best of my ability, of audio cassette Nos. 1-2 of the May 24, 2004, meeting of the Governor's Consumer Energy Protection Task Force.



Cynthia A. Peterson, PLS